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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-5847

HARRELL ALEXANDER, SR., PETITIONER

v.

GARDNER-DENVER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (App. 33-43) is reported at 346 F. Supp. 1012. The opinion of the court of appeals (App. 45-47) is reported at 466 F. 2d 1209.

JURISDICTION

The judgment of the court of appeals (App. 48) was entered on August 11, 1972. On November 4, 1972, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including December 8, 1972, and the petition was filed on the latter date. The petition was granted on February 20, 1973. 410 U.S. 925. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, by invoking the grievance-arbitration procedures of a collective-bargaining agreement which are pursued to termination by his union, an employee waives his right under Title VII of the Civil Rights Act of 1964 to bring suit in federal district court for employment discrimination.

STATUTES INVOLVED

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer * * * to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5, provides in pertinent part:

> (e) If within thirty days after a charge [of unlawful employment practice] is filed with the Commission * * * the Commission has been unable to obtain voluntary compliance * * *, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the unlawful employment practice. * * *

(f) Each United States district court * * * shall have jurisdiction of actions brought under this subchapter * * *.

(g) If the court finds that the respondent has intentionally engaged in * * * an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate * * *.

INTEREST OF THE UNITED STATES

The decision in this case is likely to have a significant impact upon enforcement of federal rights under Title VII of the Civil Rights Act of 1964. In that Act Congress has entrusted the Equal Employment Opportunity Commission and the Attorney General with important responsibilities for eliminating religious, racial, ethnic, or sexual discrimination in employment. But Title VII also strongly relies on private court actions as a means of enforcing statutory rights against discriminatory employment practices. At the same time, federal labor policy favors settlement of disputes arising under collective bargaining agreements through the grievance and arbitration procedures provided for in such agreements. The decision of the court of appeals, which in effect requires an employee to choose between grievance-arbitration and suit under Title VII, interferes with both of these federal statutory policies. The United States believes that the policies are complementary and that an election of forums, which necessarily entails also an election of rights, should not be required.

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STATEMENT

In May 1966 petitioner, a black man, was hired by respondent to do maintenance work. In June 1968 he was promoted to a position as a trainee drill operator. He was discharged from employment in September 1969. Respondent informed petitioner at that time that he was being discharged for producing too many defective or unusable parts that had to be scrapped (App. 19–20).

Petitioner protested his discharge by filing a grievance under the collective bargaining agreement between respondent and United Steelworkers of America, Local Union No. 3029, of which petitioner was a member (App. 11, 20). Petitioner's grievance did not allege that his discharge was racially motivated, only that it was unjust (App. 32). Under the collective bargaining agreement, respondent had retained "the right to hire, suspend or discharge for proper cause" (App. 23) but had agreed with the union "that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry" (*ibid.*).

Petitioner's grievance was presented by the union through a multistep grievance procedure. Apparently the issue of racial discrimination was first raised in the final pre-arbitration step of the grievance procedure (App. 12–13). All of petitioner's claims were rejected by respondent and the grievance proceeded to arbitration (App. 20). Prior to arbitration, however, petitioner filed a parallel charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Em-

ployment Opportunity Commission on November 5, 1969 (App. 46).

At the arbitration hearing, held on November 20, 1969, the union did not press the issue of racial discrimination (App. 13–14). The only mention made by the union of any kind of discrimination was the bare recital of the text of a letter to the union by petitioner, which stated that "I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I * * * have been the target of preferential discriminatory treatment" (App. 30). The union representative did testify, however, that respondent's normal practice was to transfer unsatisfactory trainee drill operators back to their former positions (App. 22). Petitioner, who believed that the union was not adequately representing him with respect to his claim of racial discrimination (App. 14), informed the arbitrator that he had filed a claim with the Colorado Commission because he "could not rely on the union" (*ibid.*).

On December 30, 1969, the arbitrator issued his decision, finding that petitioner had been "discharged for just cause" (App. 22). The arbitrator's five-page opinion did not refer to the question of racial discrimination. The arbitrator stated that the union had failed to produce evidence of a practice of transferring rather than discharging unsatisfactory drill operators, but he referred to that issue only in relation to the general propriety or fairness of petitioner's discharge (see *ibid.*).

On July 25, 1970, the Equal Employment Opportunity Commission determined that there was not rea-

sonable cause to believe that a violation of the Act had occurred (App. 33). The Commission thereafter notified petitioner of his right under Title VII of the Civil Rights Act of 1964 to institute a private action against respondent in federal district court (*ibid.*). Petitioner then timely filed this action in the United States District Court for the District of Colorado, alleging that his discharge resulted from a racially discriminatory employment practice made unlawful by the Act.

The district court found that petitioner's claim of racial discrimination had been submitted to the arbitrator. The court then held that petitioner, having elected the arbitration remedy, had no right to sue under the Act. The court acknowledged the existence of a conflict of authorities on this issue but chose to rely on *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (C.A. 6), affirmed by an equally divided court, 402 U.S. 689. The court of appeals affirmed *per curiam* on the basis of the district court's opinion.

SUMMARY OF ARGUMENT

A

Congress has placed the final responsibility for enforcement of Title VII guarantees upon the federal courts. This Court has in prior cases recognized the importance of judicial enforcement of Title VII by upholding the right of individual access to the courts. Petitioner here satisfied all the statutory requisites for bringing a civil action; there is no statutory basis for the dismissal of his action by the courts below.

B

In dismissing petitioner's action, the courts below purported to rely upon the national labor policy favoring arbitration as a method of settling labor disputes. However, that policy makes arbitration the exclusive means only of settling disputes that arise out of a collective bargaining agreement. This Court has expressly held that the arbitral forum does not displace the courts in the adjudication of statutory claims. Contract rights are to be vindicated in the arbitral forum, statutory rights in the courts. And the right asserted by petitioner is peculiarly statutory in nature, existing independently of the collective bargaining agreement.

Moreover, arbitration is an inadequate forum for the vindication of the important civil rights guaranteed by Title VII. The role of the arbitrator is merely to interpret and apply the terms of the contract; in doing so he rarely relies upon public law concepts, and he has no authority to decide purely statutory matters. Moreover, the arbitrator, who is typically not trained in the law, has no special competence or experience in the adjudication of statutory questions. The employee's claim of discrimination may not be adequately presented by his union. And the grievance-arbitration process does not ensure careful, accurate fact-finding of a kind necessary for the proper determination of statutory claims.

The national labor and civil rights policies are therefore best accommodated by separate enforcement of contractual and statutory rights. A requirement that an

aggrieved employee must elect between the arbitral and judicial forums would mean that, as to any broad class of employees, neither contractual nor statutory rights would be fully vindicated. Both rights should be given full protection. Arbitration should be available for expeditious consideration of contractual claims of discrimination and thus to put an end to the dispute between the union and employer, but the employee should be free to pursue his statutory claims independently in the courts. This approach is consistent with the general statutory scheme, which provides multiple forums for the consideration of discrimination claims, and is necessary to the full effectuation of the congressional guarantee against employment discrimination.

C

The courts, in hearing Title VII claims, should not defer to arbitral findings or decisions with respect to contract claims. The factors that render arbitration an inadequate forum for the adjudication of statutory rights also make inappropriate any judicial deference to the arbitrator.

But even assuming *arguendo* the desirability of a policy of partial deference, there is no basis for deference to the arbitral decision in this case. The claim of discrimination, and the important facts relating to that claim, were not adequately presented to the arbitrator. The arbitrator did not purport to decide the issue of discrimination or to find any of the facts that would have been necessary for such a decision. His determination that respondent had just cause to dismiss petitioner does not resolve the question

whether under the circumstances it was racially discriminatory to discharge, rather than demote, petitioner.

ARGUMENT

AN EMPLOYEE DOES NOT WAIVE HIS RIGHT UNDER TITLE VII OF THE CIVIL RIGHTS ACT TO BRING SUIT IN FEDERAL DISTRICT COURT FOR EMPLOYMENT DISCRIMINATION MERELY BY HAVING HIS UNION PURSUE TO TERMINATION THE GRIEVANCE-ARBITRATION PROCEDURE UNDER THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE UNION AND THE EMPLOYER

A. THE FEDERAL COURTS ARE THE FORUM ESTABLISHED BY CONGRESS FOR DETERMINING THE RIGHTS CONFERRED BY TITLE VII

1. The broad goal of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, is to eliminate discrimination in employment because of race, color, religion, sex, or national origin. Congress hoped that this comprehensive goal would be achieved primarily through conciliation and persuasion. To that end it created the Equal Employment Opportunity Commission and established a procedure under Title VII whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have the opportunity to conciliate a dispute before an individual was permitted to sue. Congress has vested the Commission with authority to investigate an individual charge of discrimination, to attempt to achieve voluntary compliance with the requirements of Title VII, and to bring a civil action against the employer or union named in the charge. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f). But the Commission itself has no direct powers of enforcement; it has no authority to impose administrative sanctions.

Congress placed the final responsibility for enforcement of Title VII guarantees in the federal courts. They are authorized under the Act to grant injunctive relief, and to order affirmative action if they find that the Act has been violated. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(g). The courts are empowered to grant such relief whether or not the Commission has made a finding of reasonable cause to believe that the Act has been violated. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798–799. Similarly, findings and orders made by state agencies do not bar an individual from pursuing his claim before the Commission and in the federal courts. See 42 U.S.C. (1970 ed., Supp. II) 2000e–5 (b); *Cooper* v. *Philip Morris, Inc.*, 464 F. 2d 9 (C.A. 6).

It is thus obvious that "[t]o the federal courts alone is assigned the power to enforce compliance with [Title VII]." *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303, 310 (C.A. 5).[1] Indeed, this Court has recog-

[1] This conclusion is further confirmed by the legislative history of earlier versions of Title VII, which would have given the Commission more power. The original Senate version provided for a quasi-judicial board with authority to receive unresolved complaints of employment discrimination from an Administrator within the Department of Labor, and to issue broad remedial orders. See *Comparative Analysis of Title VII of H.R. 7152 as Passed by the House with S. 1937, as Reported*, 110 Cong. Rec. 12596–12597. Moreover, the statute as originally enacted did not authorize the Commission to institute civil actions, except to compel compliance with orders rendered in private suits. That power was conferred on the Commission by the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 103. But in authorizing the Commission to bring suit to enforce Title VII, Congress expressly preserved the private right of action. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f), (1).

nized the importance of judicial enforcement of Title VII guarantees in upholding the right of individual access to the courts against allegations of procedural obstacles. See *McDonnell Douglas Corp.* v. *Green, supra; Love* v. *Pullman Co.*, 404 U.S. 522.

2. In keeping with the statutory plan, petitioner in this suit sought judicial enforcement of his Title VII rights. The courts below held that petitioner, by having had his grievance under the no-discrimination clause of his collective bargaining agreement pursued to final arbitration, had waived his right to sue his employer for unlawful racial discrimination under Title VII. They cited no statutory authority for this result, and there is none.

Plaintiff had filed timely charges of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission.[2] After investigation, the Equal Employment Opportunity Commission determined that there was not reasonable cause to believe that the Act had been violated; it thereupon notified petitioner of his right to bring a private suit against his employer.[3] There is no statutory provision for waiver of that right, and, as we have noted, this

[2] Section 706(b), 42 U.S.C. 2000e-5(b), required that a charge of unlawful employment practice must first be submitted to a state or local agency. The same requirement is now set forth at 42 U.S.C. (1970 ed., Supp. II) 2000e-5(c).

[3] Section 706(e), 42 U.S.C. 2000e-5(e), permitted suit by an individual upon the Commission's failure, within a certain time, to achieve voluntary compliance with the requirements of Title VII. Such suits are now permitted under 42 U.S.C. (1970 ed., Supp. II) 2000e-5(f)(1).

Court in *McDonnell Douglas Corp.* v. *Green, supra,* expressly held that a "no reasonable cause" finding by the Commission does not bar a private suit based on the same complaint. There is also no statutory provision for withdrawal of a federal district court's jurisdiction over Title VII suits on account of prior arbitration of similar contractual issues; the Act grants the federal district courts jurisdiction over such suits without restriction or qualification, aside from that of timeliness (see 42 U.S.C. 2000e–5(f); 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f)(3)), and petitioner's suit was timely filed.

B. TITLE VII AND COLLECTIVE BARGAINING AGREEMENTS PROVIDE LEGALLY DISTINCT RIGHTS THAT ARE PROPERLY ENFORCEABLE IN DIFFERENT FORUMS

1. Notwithstanding the absence of any statutory authority for doing so, the courts below held that the pursuit of petitioner's claim under the no-discrimination clause of his collective bargaining agreement to final arbitration foreclosed the possibility of judicial consideration of his Title VII claim. In so holding, the courts below relied on what they perceived to be the dictates of national labor policy, as exemplified by this Court's decisions in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, and the three *Steelworkers* cases (*Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Co.,* 363 U.S. 574; *Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593). See also *Boys Markets, Inc.* v. *Clerks Union,* 398 U.S. 235. The Court in those cases held that both employers and unions may be compelled to arbitrate a contract

grievance in accordance with the terms of the governing collective agreement and emphasized that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers* v. *Enterprise Corp., supra,* 363 U.S. at 599. And in *Republic Steel* v. *Maddox,* 379 U.S. 650, the Court held that contract grievance procedures must be exhausted before contract claims may be submitted to the courts.

It is clear, however, that the holdings in these cases fall far short of requiring a court to accept an arbitrator's denial of a contractual claim as also dispositive of a distinct statutory claim. The judgments and opinions in those cases stand only for the primacy of arbitration as a means of resolving contractual issues; they do not call into question the independent responsibility of the judiciary to resolve noncontractual, statutory issues. Moreover, this Court has explicitly indicated that the arbitral forum does not displace the courts in the adjudication of peculiarly statutory claims. For example, in *McKinney* v. *Missouri-Kansas-Texas R. Co.,* 357 U.S. 265, the Court held that an employee returning to employment after his term of military service could sue to enforce his seniority rights under the Universal Military Training and Service Act, without having pursued the grievance-arbitration remedy under his collective bargaining agreement; the Court's reasoning suggested (357 U.S. at 270) that even if the plaintiff had first asserted his contractual seniority rights through arbitration, he would nevertheless have been entitled to bring

suit under the statute. Similarly, in *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, the Court held that the federal district courts have jurisdiction over a seaman's statutory suits for wages, even when the seaman has ignored an available arbitral remedy. In distinguishing between *Arguelles* and *Maddox*, Mr. Justice Harlan emphasized that where the substantive rights being asserted "derive solely from the contract," strong policy concerns support the exclusivity of the arbitral forum, but that where a right is claimed under a federal statute, "the presumption of comprehensiveness of the arbitral remedy is * * * rebutted" and remedies prescribed by statute for vindication of the statutory right remain available. *U.S. Bulk Carriers* v. *Arguelles, supra*, 400 U.S. at 361–362 (concurring opinion).

In short, contract rights are to be vindicated in the arbitral forum, statutory rights in the courts. This principle applies *a fortiori* where, as here, the statute confers upon individuals a right that is wholly independent of the collective bargaining agreement—a right whose substance derives entirely from the statute itself (and from the regulations adopted under it by the agency responsible for its enforcement).[4] Thus, in

[4] Because Title VII rights are in this sense self-contained, the present case does not present the difficulty that divided the Court in *Arguelles*. In that case, the claimant's statutory and contractual rights were interdependent—whether (and in what measure) he was entitled to the statutory remedy depended "entirely on interpretation and application of the bargaining agreement." *Arguelles, supra*, 400 U.S. at 371 (dissenting opinion of Mr. Justice White). By contrast, Title VII rights apply equally and in the same measure irrespective of whether a col-

our view, a fundamental error committed by the courts below was in assimilating petitioner's contractual and statutory claims, without giving due recognition to the fact that the rights created by Title VII are legally distinct from those established by contract. Since the rights are separate, an individual asserting violations of both should be entitled to bring each claim before the separate forum which is uniquely authorized to interpret and enforce it.

2. There are significant differences between the processes of arbitration under a collective bargaining agreement and litigation under Title VII that highlight the importance of recognizing that the separate rights established by the contract and the statute are appropriately enforceable in separate forums.

The role of the arbitrator is to interpret and apply the contract. This Court emphasized the restricted scope of the arbitral inquiry in *Steelworkers* v. *Enterprise Corp.*, *supra*, 363 U.S. at 597:

> * * * [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it

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lective bargaining agreement exists or whether that agreement, if it does exist, contains a no-discrimination clause. Moreover, in further contrast to the statute involved in *Arguelles*, Title VII was enacted long after use of arbitration under collective agreements had become widespread, and yet Congress specifically provided for judicial enforcement of Title VII rights. In this second respect the present case is more similar to *McKinney*, *supra* (see 357 U.S. at 268), in which the Court was unanimous on this issue, than it is to *Arguelles*.

draws its essence from the collective bargaining agreement.

The narrow responsibility conferred on the arbitrator does not include investigation into and vindication of statutory rights. See Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 32–35 (1971). As a recent commentator has observed (Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40, 47–49 (1969)):

> Even where there is a no-discrimination clause prohibiting discrimination on the basis of race—and even where the clause has been negotiated subsequent to the passage of civil rights legislation—arbitrators are generally reluctant to rely upon public law concepts in their opinions and awards. The primary reason for this attitude is the well-accepted notion that the arbitrator is a creature of the parties and is commissioned to interpret their wishes. * * * * * * Ordinarily, * * * the parties do not intend arbitrators to function as a mini-Equal Employment Opportunity Commission. * * *

Moreover, arbitrators are without special competence or experience in the interpretation and application of statutory and constitutional rights. See *U.S. Bulk Carriers* v. *Arguelles, supra.* See, also, Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 Ga. L. Rev. 398 (1969). A substantial proportion of practicing labor arbitrators are not lawyers. See Note, *The NLRB and Deference to Arbitration*, 77 Yale L.J. 1191, 1194, n. 28 (1968). The arbitrator's expertise is in the "industrial common law—the practices of the industry and

the shop." *Steelworkers* v. *Warrior & Gulf Co., supra,* 363 U.S. at 581–582. Such expertise does not guarantee effectuation of the underlying purposes of Title VII:

> Few arbitrators possess experience in dealing with problems in the civil rights area. Such problems, particularly those arising under Title VII, are often quite difficult * * *. * * * [E]ntrusting the protection of the rights created by Title VII to the relatively unreviewable discretion of an arbitrator would seem to involve a substantial curtailment of the protection provided by Congress. [Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employemnt Discrimination,* 46 N.Y.U. L. Rev. 449, 469 (1971); footnotes omitted.]

This problem is compounded by the very limited scope of judicial review of arbitration awards. See, *e.g.,* Jalet, *Judicial Review of Arbitration: The Judicial Attitude,* 45 Cornell L.Q. 519, 532–542 (1960); Note, *Judicial Review of Arbitration Awards on the Merits,* 63 Harv. L. Rev. 681 (1950). The limited scope of judicial review of arbitration awards is appropriate, at least in part, because arbitrators merely interpret and apply the disparate provisions of privately-adopted agreements. But Congress has, in Title VII, created nation-wide rights and provided methods for their enforcement intended to assure that they will be judicially defined and uniformly applied. The availability of uniform judicial enforcement of Title VII rights thus serves an important public interest in assuring that the decisions in Title VII cases will affect the entire class of persons who are the victims of discrimination and not merely the parties to a contract.

There is also a serious risk that an employee asserting primarily statutory claims may be inadequately represented in the grievance-arbitration process. In contrast to Title VII's emphasis upon the individual's right of access to the courts, collective bargaining agreements place the responsibility for the extent and manner of processing a grievance on the union, not the individual aggrieved. See *Vaca* v. *Sipes,* 386 U.S. 171; *Republic Steel Co.* v. *Maddox, supra.* See, also, Cox, *Rights Under a Labor Agreement,* 69 Harv. L. Rev. 601 (1956). Ordinarily the employee will be represented by a union officer with no legal training. See Lev & Fishman, *Suggestions to Management: Arbitration* v. *The Labor Board,* 10 B.C. Ind. & Com. L. Rev. 763, 768 (1969). Moreover, in some instances, at least, the union may have little interest in pressing claims of racial discrimination. That may have been true in this very case; certainly petitioner thought that the union tried to "water * * * down" his claim of discrimination (App. 14). Inadequate presentation of such claims may be endemic under a system of collective bargaining: "[t]he collective bargaining process is premised on *majority* rule, whereas Title VII sets forth certain statutory protections for the *individual* who is a member of a proscribed *minority.*" Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII,* 69 Mich. L. Rev. 599, 648 (1971) (emphasis in the original). See, also, Gould, *supra,* 118 U. Pa. L. Rev. at 49. And it is not without significance that Congress found it necessary to afford the protections of Title VII against unions as well as employers, and that much of the significant

litigation under the Act has been directed against union defendants.

Furthermore, the grievance-arbitration process is not designed to ensure the kind of careful fact-finding appropriate where important civil rights are at issue. Racial discrimination is rarely practiced openly and therefore must frequently be proved by detailed comparison of the treatment of the class protected by Title VII with that afforded other individuals. Extensive discovery may be essential, yet discovery in arbitration is limited and compulsory process is probably not available.[8] In arbitration proceedings witnesses do not testify under oath and there is a lack of skilled cross-examination (and frequently no cross-examination at all). See Elkouri & Elkouri, *How Arbitration Works* 155–156 (1960); see generally Fleming, *The Labor Arbitration Process* (1965). The process is basically an informal one in which "[a]rbitrators * * * need not give their reasons for their results [and] the record of their proceedings is not as complete as it is in a court trial * * *." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203. This is not the method prescribed by Congress for the adjudication of Title VII rights.

3. Separate enforcement of Title VII and collective bargaining rights properly accommodates congressional policies favoring both private resolution of employment disputes and full protection of the individ-

[8] See generally Smith, Merrifield & Rothchild, *Collective Bargaining and Labor Arbitration* 217–218 (1970). The extent of the discovery procedures presently afforded parties to labor arbitration proceedings is subject to debate. Compare Note, *Developments in the Law-Discovery*, 74 Harv. L. Rev. 940, 943 (1961) with Jones, *The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery*, 116 U. Pa. L. Rev. 830, 877–885 (1968).

ual against discrimination. By contrast, the approach adopted by the court below would undermine both national labor policy, favoring arbitration of contract disputes, and the policy of the civil rights laws, which provide for adjudication of statutory claims.

If employees were required to elect between the arbitral and judicial forum, as the decision below would force them to do, individuals who believe that their contractual remedies are inadequate or that surer relief may be obtained under Title VII would be likely to bypass the grievance procedure, while the speed and lesser expense of the arbitral remedy might prompt others to forego judicial enforcement of their statutory rights. Such a haphazard method of enforcement would only ensure that, as to any broad class of employees, neither contract rights nor statutory rights would be fully vindicated: valid contract claims would in some instances be suppressed in the interest of statutory adjudication, whereas in other cases legitimate Title VII claims would be sacrificed in order to obtain prompt settlement of a contract dispute. Yet there is no reason why contract rights and statutory rights should not both be given full protection, by allowing an employee's claim to be resolved in the appropriate forum with respect to each of his distinct rights.

Harmonious resolution of labor disputes is of course promoted by encouraging employees to invoke grievance-arbitration procedures; the availability of arbitration as a prompt remedy for such disputes lessens the likelihood of labor strife. Arbitration should therefore be available for expeditious consideration of contractual claims of discrimination. "This comports not only with the national labor policy favor-

ing arbitration as a means for the final adjustment of labor disputes * * * but also with the specific enforcement policy of Title VII that discrimination is better curtailed through voluntary compliance with the Act than through court orders." *Hutchings* v. *United States Industries, Inc., supra,* 428 F. 2d at 313. The unrestricted availability of arbitration, and its utilization on behalf of employees raising claims of discrimination, tends to strengthen the process of collective bargaining by buttressing the allegiance of minority group members to their labor organizations. Cf. *United Packinghouse Workers* v. *National Labor Relations Board,* 416 F. 2d 1126, 1135–1136 (C.A. D.C.), certiorari denied, 396 U.S. 903.

At the same time, allowing the employee to pursue his statutory claims independently in the courts ensures fuller effectuation of the congressional guarantee against employment discrimination and thus also serves an important public interest (see p. 17, *supra*). Allowing resort to both appropriate forums would be similar to the procedure under the National Labor Relations Act, permitting some issues to be presented both to the arbitrator and to the National Labor Relations Board:

> By allowing the dispute to go to arbitration * * * those conciliatory measures which Congress deemed vital to "industrial peace" * * * and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area. [*Carey* v. *Westinghouse Corp.,* 375 U.S. 261, 272.]

Resort to both appropriate forums was foreclosed by the courts below primarily on the ground that the employee, but not the employer, would thereby be enabled to relitigate the arbitral award. But this falsely characterizes the nature of the employee's lawsuit. In pursuing his statutory claim in court, an employee is not challenging the arbitrator's interpretation of the collective bargaining agreement; he is asserting that he has different, and additional, statutory rights that the arbitrator did not—indeed, probably could not—vindicate. The reason why the employer, unlike his employee, cannot subsequently proceed in the courts is simply that Title VII does not grant employers substantive rights against their employees; an employer cannot as a matter of law be the victim of employment discrimination by his employee. See Comment, *Dewey* v. *Reynolds Metals Co.: Labor Arbitration and Title VII*, 119 U. Pa. L. Rev. 684, 691–692 (1971); Meltzer, *supra*, 39 U. Chi. L. Rev. at 38–39.

The district court below also was of the view that the availability of a Title VII suit after arbitration "would sound the death knell for arbitration clauses in labor contracts" (App. 43). Such a result seems highly unlikely. As this Court has repeatedly recognized, an arbitration agreement is the *quid pro quo* for a no-strike clause. See, *e.g.*, *Boys Markets, Inc.* v. *Clerks Union*, *supra*; *Textile Workers Union* v. *Lincoln Mills*, *supra*. An employer thus has ample incentive to agree to an arbitration clause, regardless of the possibility that it may not prevent litigation about employment discrimination.* Indeed, even in an employment

* The experience under the National Labor Relations Act also indicates that occasional subsequent litigation does not deter

discrimination case, an arbitrator's award in favor of the employer ends the latter's dispute with the union (subject, of course, to limited judicial review) and thus provides valuable assurance against disruption of the employer's activities by labor-management strife, even though the employer remains subject to suit by an employee under Title VII on a similar claim. This is another important reason why such a suit does not amount to a relitigation of the arbitrator's award.

Furthermore, Congress in enacting Title VII evidently concluded that the need to vindicate rights against employment discrimination outweighs the desirability of protecting employers against similar claims in more than one forum. Congress recognized that several different forums would have jurisdiction over employment discrimination disputes. See, *e.g.*, 42 U.S.C. (1970 ed., Supp. II) 2000e–5(b) (state agencies); 42 U.S.C. 2000e–15 (President's Committee on Equal Employment Opportunity); 110 Cong. Rec. 7207 (National Labor Relations Board). The rights enforced in each forum were considered to be independent of each other. Senator Clark, a leading sponsor of the bill, explained (110 Cong. Rec. 7207):

> [T]itle VIII * * * does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action

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parties from entering into arbitration clauses. At least prior to its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971), the board deferred to arbitral decisions in only a small percentage of the arbitration cases it reviewed (see Note, *The NLRB and Deferences to Arbitration*, *supra*, 77 Yale L.J. at 1204–1208), yet a representative sampling of collective bargaining agreements showed that 94 percent contained arbitration clauses. Bureau of National Affairs, *Labor Relations Yearbook: 1970*, 38.

should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. Accordingly, three courts of appeals have held that Title VII actions are not barred by prior adverse determinations under other federal laws with respect to the same practices. *Tipler* v. *E.I. duPont de Nemours and Co.*, 443 F. 2d 125 (C.A. 6); *Taylor* v. *Armco Steel Corp.*, 429 F. 2d 498 (C.A. 5); *Norman* v. *Missouri Pacific R.R.*, 414 F. 2d 73 (C.A. 8). There is, if anything, even less reason why employers and unions (against both of whom Title VII's anti-discrimination provisions are directed) should, by private agreement, be able to deprive individuals of the right of access to the courts conferred on them by Congress.

In sum, while Congress was silent on the relationship of arbitration and Title VII rights, the multiple forum approach which it adopted with respect to other means of securing rights against discrimination strongly suggests that arbitration is merely an additional means by which relief from discrimination may be sought under relevant provisions of the collective agreement, without depriving individuals of their statutory right to a judicial determination of their Title VII rights. Both federal labor policy and federal civil rights policy can most effectively be served by allowing "plaintiffs to utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment." *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 715 (C.A. 7). Accord: *Hutchings* v.

United States Industries, Inc., 428 F. 2d 303 (C.A. 5); *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569 (C.A. 9).[1] Indeed, this is the only approach that is fully consistent with the intention of Congress to preserve all available rights against discrimination in employment.

C. JUDICIAL DEFERENCE TO ARBITRAL DECISIONS IS INAPPROPRIATE IN TITLE VII CASES, AND WOULD BE ESPECIALLY UNWARRANTED IN THE CIRCUMSTANCES HERE

For the reasons discussed above, we believe that an employee asserting Title VII rights is entitled to have his claims adjudicated by a court notwithstanding any prior exhaustion of remedies available under the pertinent collective bargaining agreement. The same reasons support the conclusion that in hearing such claims, the courts should not defer to arbitral findings or decisions, which relate only to matters of contract and not to statutory rights. However, even if a policy of limited judicial deference to the arbitral decision is adopted, there is no basis in this case for such deference.

We discuss this issue as a question of judicial "deference" because it is clear that the principles of *res judicata* and collateral estoppel do not bar litigation, subsequent to the arbitration award, of all questions pertaining to an employee's statutory claims. In the first place, the doctrines of *res judicata* and collateral estoppel do not appear to be technically applicable at all. At common law these doctrines applied

[1] These decisions, of course, conflict with the decision below and with *Dewey* v. *Reynolds Metals Co.*, *supra*.

only with respect to prior judgments in judicial proceedings. Whether decisions of an administrative tribunal "are binding in subsequent controversies depends upon the character of the tribunal and the nature of its procedure and the construction of the statute creating the tribunal and conferring powers upon it." American Law Institute, *Restatement of Judgments*, § 2 (1942). The arbitrator, however, is not a public official or tribunal but is essentially a private agent of the parties to the contract. His award is given effect by the courts basically because it thus becomes a part of the parties' contractual agreement, rather than as a matter of *res judicata* or collateral estoppel.

In any event, the judgment of any tribunal of special and limited jurisdiction is conclusive only as to questions within its competence. American Law Institute, *Restatement of Judgments*, § 71. The effect on subsequent litigation of an arbitrator's award is therefore restricted to contract issues. This is true not only of the arbitrator's legal determinations but of his findings of fact as well. *Id.*, § 71, comment *d* and illustration 1.[8]

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[8] Moreover, while the union acts in a representative capacity in the grievance proceeding, it does not act as a mere agent subject to the control of the complaining employee as principal (see *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332), and it is the union rather than the employee that controls the presentation to the arbitrator (*Vaca* v. *Sipes*, *supra*). For this reason, also, it would be inappropriate to apply the principle of collateral estoppel to claims of the employee not directly presented to and decided by the arbitrator. Cf. American Law Institute, *Restatement of Judgments*, § 85, comment *e*.

4. In addition to the foregoing general considerations, the reasons why the courts, in specifically considering Title VII claims, ought not to defer to arbitral decisions may be briefly restated and summarized. First, the arbitral award involves a different issue of law than the one before the court: the arbitrator, typically not a lawyer himself, decides only whether the employer's conduct conforms to the contract, and in so deciding he ordinarily does not draw upon public law concepts; certainly, such concepts are not binding upon the arbitrator in interpreting the collective bargaining agreement.

Second, the arbitral fact-finding process falls far short of judicial standards. Normal rules of evidence do not apply; often there is no opportunity for cross-examination of witnesses and their testimony is not given under oath; discovery is limited. These informal and relatively crude procedures expedite the resolution of labor disputes, but they do not provide a sufficient guarantee of accuracy when important civil rights are at issue.

Third, the employee's claim of discrimination may be inadequately presented to the arbitrator. The union, which controls its presentation, may be unsympathetic to the claim or may, as a matter of litigation strategy, subordinate that claim to others that may appear to be sounder or more appealing to the arbitrator. Or the union's representation of its employees generally may in some cases be inadequate; the union representatives themselves are often not trained in the law.

We believe these considerations demonstrate that the policy adopted by the courts below—one of total deference to the arbitral decision—is unsound and would re-

sult in a substantial and unwarranted diminution of the protective force of Title VII. We further believe that a policy of partial deference, such as that enunciated in *Rios* v. *Reynolds Metals Co.*, 467 F. 2d 54 (C.A. 5) (see also, Edwards & Kaplan, *supra*, 69 Mich. L. Rev. at 651-652), is also unwarranted and should be rejected by this Court. See generally *Meltzer, supra*, 39 U. Chi. L. Rev. at 35-46.

The Fifth Circuit in *Rios* held that, in cases such as this, a district court should examine the prior grievance arbitration on the basis of the following criteria (467 F. 2d at 58):

> First, there may be no deference to the decision unless the arbitral hearing dealt adequately with all factual issues which coincide with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.

We agree with the respondent here that under such a procedure, "the district court would find itself holding a hearing to determine if [deference] was appropriate, which hearing could * * * in length and complexity be similar to a Title VII trial" (Resp. Br. 35). At the same time, the *Rios* guidelines are not, in our view, sufficiently protective of the important civil rights established by Title VII. For example, a no-discrimination clause in a collective bargaining agreement may by its terms appear to create a right identical in substance to that conferred by Title VII, yet if the arbitrator does not apply Title VII concepts as elaborated by the courts the rights will not in fact coincide; but *Rios* apparently does not require the district courts to defer only to arbitral decisions expressly and accurately relying upon public law concepts. Similarly, even when all primary factual issues are raised before the arbitrator, there is no reason to believe that he will be as sensitive to subtle forms of discrimination, or to the potentially discriminatory implications of an engrained industrial practice, as are the courts: the arbitrator's findings of fact are unlikely to reflect the kind of vigilant inquiry into employment practices Congress envisioned in enacting Title VII. This is further emphasized by the fact that even "fair and regular" arbitration proceedings are procedurally inadequate under traditional judicial standards and do not provide as full an opportunity, through proof, to reveal subtle forms of discrimination. Moreover, the *Rios* guidelines do not fully take into consid-

eration the possibility of inadequate representation before the arbitrator.

For all of these reasons, we believe that judicial deference to an arbitrator's findings in a grievance proceeding is wholly inappropriate in a Title VII case.

2. But even assuming *arguendo* that some policy of partial deference is appropriate, there is no basis for deference to the arbitral decision in this case. Even though the district court found that the claim of discrimination was presented to the arbitrator (App. 34), the arbitrator did not discuss or purport to decide the issue of discimination. His finding was simply that "the discharge * * * was for just cause" (App. 21). That finding is not inconsistent with petitioner's claim of discrimination: even if petitioner was not qualified for the position he held, and therefore properly subject to dismissal, he was discriminated against if white employees similarly unqualified are treated differently (*e.g.*, demoted but not discharged).* But the union presented no probative evidence on this issue (see App. 22). In fact, the union in representing petitioner did not even raise the claim of racial discrimination; that issue was put before the arbitrator—to

* In the field of labor relations it is well established that a finding of just cause for discharge does not preclude a finding that the discharge was discriminatory. See, *e.g.*, *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 138 F. 2d 86 (C.A. 3), certiorari denied, 321 U.S. 778.

the limited extent that it can be said to have been raised at all—only by petitioner, and his principal reference to the issue was to state that because the union's representation of his claim was inadequate, he had lodged a complaint against respondent with the state equal employment agency (App. 14).

Thus the arbitral proceeding here failed to satisfy even the *Rios* guidelines. It is not clear that the no-discrimination clause of the contract coincides with Title VII rights, as interpreted and applied by the courts. Nor is it plain that the arbitrator's decision, by sustaining a discharge in circumstances where white employees may only be demoted, does not contravene Title VII policy. Moreover, the evidence presented did not deal adequately with all factual issues raised by the claim of discrimination, and the arbitrator did not expressly decide those factual issues. To permit such cursory arbitral consideration of claimed discrimination to foreclose an employee's efforts to obtain judicial vindication of his Title VII rights would seriously weaken enforcement of Title VII and thus jeopardize achievement of the important economic and social objectives of that Act.

CONCLUSION

For the reasons stated above, the judgment below should be reversed and the case remanded for trial of petitioner's Title VII claims.

Respectfully submitted.

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OCTOBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALEXANDER *v.* GARDNER-DENVER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 72-5847. Argued November 5, 1973—
Decided February 19, 1974

Following discharge by his employer, respondent company, petitioner, a black, filed a grievance under the collective-bargaining agreement between respondent and petitioner's union, which contained a broad arbitration clause, petitioner ultimately claiming that his discharge resulted from racial discrimination. Upon rejection by the company of petitioner's claims, an arbitration hearing was held, prior to which petitioner filed with the Colorado Civil Rights Commission a racial discrimination complaint which was referred to the Equal Employment Opportunity Commission (EEOC). The arbitrator ruled that petitioner's discharge was for cause. Following the EEOC's subsequent determination that there was not reasonable ground to believe that a violation of Title VII of the Civil Rights Act of 1964 had occurred, petitioner brought this action in District Court, alleging that his discharge resulted from a racially discriminatory employment practice in violation of the Act. The District Court granted respondent's motion for summary judgment, holding that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII. The Court of Appeals affirmed. *Held:* An employee's statutory right to trial *de novo* under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement. Pp. 7-23.

(a) Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination, as may be inferred from the legislative history of Title VII, which manifests a congressional intent to allow an individual to

Syllabus

pursue rights under Title VII and other applicable state and federal statutes. Pp. 10–12.

(b) The doctrine of election of remedies is inapplicable in the present context, which involves statutory rights distinctly separate from the employee's contractual rights, regardless of the fact that violation of both rights may have resulted from the same factual occurrence. Pp. 12–14.

(c) By merely resorting to the arbitral forum petitioner did not waive his cause of action under Title VII; the rights conferred thereby cannot be prospectively waived and form no part of the collective-bargaining process. Pp. 14–15.

(d) The arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble or duplicate Title VII rights. Pp. 15–17.

(e) In instituting a Title VII action, the employee is not seeking review of the arbitrator's decision and thus getting (as the District Court put it) "two strings to his bow when the employer has only one," but is asserting a right independent of the arbitration process that the statute gives to employees, the only possible victims of discriminatory employment practices. P. 17.

(f) Permitting an employee to resort to the judicial forum after arbitration procedures have been followed does not undermine the employer's incentive to arbitrate, as most employers will regard the benefits from a no-strike pledge in the arbitration agreement as outweighing any costs resulting from giving employees an arbitral antidiscrimination remedy in addition to their Title VII judicial remedy. Pp. 17–18.

(g) A policy of deferral by federal courts to arbitral decisions (as opposed to adoption of a preclusion rule) would not comport with the congressional objective that federal courts should exercise the final responsibility for enforcement of Title VII and would lead to: the arbitrator's emphasis on the law of the shop rather than the law of the land; factfinding and other procedures less complete than those followed in a judicial forum; and perhaps employees bypassing arbitration in favor of litigation. Pp. 18–23.

(h) In considering an employee's claim, the federal court may admit the arbitral decision as evidence and accord it such weight as may be appropriate under the facts and circumstances of each case. Pp. 22–23.

466 F. 2d 1209, reversed.

POWELL, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 72-5847

Harrell Alexander, Sr., Petitioner, v. Gardner-Denver Company. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[February 19, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case concerns the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* Specifically, we must decide under what circumstances, if any, an employee's statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

I

In May 1966, petitioner Harrell Alexander, Sr., a black, was hired by respondent Gardner-Denver Company (the "company") to perform maintenance work at the company's plant in Denver, Colorado. In June 1968, petitioner was awarded a trainee position as a drill operator. He remained at that job until his discharge from employment on September 29, 1969. The company informed petitioner that he was being discharged for producing too

Syllabus

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